83

(3)

No. 07-715

FILED
FEB 4 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

JOHN WITTEN TUNNELL,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF

Paul D. Smith, Jr.
Paul D. Smith, Jr., IV
41 West Main Street
P.O. Box 991
Martinsville, VA 24114-0991
(276) 638-8222
fredsmith@smithmartinlaw.net

Attorneys for Petitioner

QUESTIONS PRESENTED

The questions presented are:

1. Whether the questions raised by the petition as important questions of unsettled law regarding a trial court's exercise of *Daubert* gatekeeping discretion under Federal Rule of Evidence 702 invading the province of the jury are settled by application of Federal Rule of Evidence 104(a).

2. Whether *Blemings v. New Holland North America, Inc.*, 128 F.Supp. 2d 952 (W.D. Va. 2001) holds that Virginia substantive law imposed an affirmative burden of proof on the Petitioner to establish that the benefits of a proposed alternative design outweighed the risks, thus negating the Petitioner's claim that the Fourth Circuit's *per curiam* opinion violated 28 U.S.C. § 1652.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

THE REASONS FOR DENYING THE PETITION ARE UNFOUNDED 1

I. *The Issues Raised in the Petition for a Writ of Certiorari Were Presented to the United States Court of Appeals for the Fourth Circuit* 2

II. *Federal Rule of Evidence 104 Does not Grant the Trial Court Exclusive Determination of Preliminary Questions* 2

III. *Blevins v. New Holland North America, Inc.*, 156 F. Supp. 2d 592 (W.D. Va. 2001), Held that Ford Motor Company v. Rustebakke, 228 Va. 421, 295 S.E. 2d 632 (1982), Was the Rule of Decision for Product Liability Cases Where no Government or Industry Standards Apply 3

Contents

Page

IV. It is Undisputed that *Daubert* did not Address Whether Federal Courts are Required Under *Erie* to Apply Substantive State Law that is Bound Up with Evidentiary Considerations Instead of Judge Made Rules or Whether State Law Should be Considered as a Factor Bearing on the Relevance and Reliability Inquiries 11

CONCLUSION 13

TABLE OF CITED AUTHORITIES

Page

Cases

Blevins v. New Holland North America, Inc.,
128 FSupp.2d 952 (W.D. VA. 2001) 1, 2, 8, 9, 10

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579, 113 S.Ct. 2786 (1993) ..... *passim*

Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d
1066 (4th Cir. 1974) 8

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct.
817 (1938) 11, 12

Ford Motor Co. v. Bartholomew, 224 Va. 421,
297 S.E.2d 672 (1982) 6, 8, 9, 10, 12

Stone v. General Motors Corporation, 243 Va. 109
(1992) 8

U.S. Constitution, Statutes, Rules, and
Other Authorities

Seventh Amendment 11, 12

28 U.S.C. § 1652 ..... 11, 12

Federal Rule of Evidence 702 ..... *passim*

Federal Rule of Evidence 703 ..... 1, 2, 3, 12

Cited Authorities

	Page
Original Advisory Committee's Note for Federal Rule of Evidence 104	1, 4
Wright & Graham, Federal Practice and Procedure: Evidence 2d § 5052.3, p. 63	5
Craig, When Daubert Gets Erie: Medical Certainty and Medical Expert Testimony in Federal Court, 77 Denv. U. L. Rev. 69 (1999-2000)	11

THE REASONS FOR DENYING THE PETITION ARE UNFOUNDED

The petition for a writ of certiorari identifies questions concerning the *Daubert* relevancy and reliability inquiries under Federal Rule of Evidence 702 which this Court has not addressed: (1) whether an expert's testimony can be excluded as irrelevant where the trial court believes trial testimony is inconsistent with deposition testimony; (2) whether an expert's testimony can be excluded as irrelevant by measuring the testimony against the substantive elements of proof of the law of a state where the cause of action did not arise; (3) whether an expert's testimony can be excluded as unreliable without considering non-*Daubert* reliability factors; (4) whether an expert's testimony can be excluded as unreliable based upon a judge mandated scientific test applied to the expert's answers to cross-examination questions at trial; and (5) whether an expert's testimony can be excluded as unreliable for failure to comply with the *Daubert* criteria without articulating the relevance of those criteria to the expert testimony at issue. The overarching concern presented by these questions is whether the discretion entrusted by the Fourth Circuit's *per curiam* opinion overreaches upon the Seventh Amendment right to have a jury determine the credibility of the witnesses and the weight of the evidence. The Respondent contends that the petition should be denied because all these questions are answered affirmatively by application of Federal Rule of Evidence 104(a).

The petition further contends that the Fourth Circuit followed Kentucky law in reversing the district court's

of a risk-benefit analysis as the rule of decision instead of Virginia law which does not in violation of 28 U.S.C. § 1652. Respondent contends that *Blevins v. New Holland North America, Inc.*, 128 F.Supp.2d 952 (2001) holds that substantive Virginia law imposes a burden on the plaintiff to establish that the benefits of an alternative design exceed the risks.

I. The Issues Raised in the Petition for a Writ of Certiorari Were Presented to the United States Court of Appeals for the Fourth Circuit.

Petitioner's filings in the Fourth Circuit Court of Appeals (Opening Brief of Appellant, Reply Brief of Appellant, and Petition for Rehearing/Rehearing *En Banc*) are replete with discussion of the questions presented by the petition for a writ of certiorari.

II. *Federal Rule of Evidence* 104 Does not Grant the Trial Court Exclusive Determination of *Preliminary Questions*.

Respondent contends that the questions presented by the petition for a writ of certiorari concerning the boundary between a trial court's discretion to exclude expert testimony and the right to have the credibility of the witnesses and the weight of the evidence decided by a jury is determined by Federal Rule of Evidence 104(a):

> That boundary is the same as for any other type of evidence. Under Federal Rule of Evidence 104(a), it is the judge who must determine all "preliminary questions"

> concerning . . . the admissibility of evidence," Fed. R. Evid. 104(a), including the evidence's relevance and threshold reliability; only then, if admitted, does the evidence's weight fall within the jury's province to decide. So, too, lay the boundary between the judge and jury under Rule 702.

Brief in Opposition, 11.

Federal Rule of Evidence 104 provides in pertinent part:

> (a) *Questions of admissibility generally.*—Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence, shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) *Relevancy conditioned on fact.*—When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Id. (emphasis added).

The Respondent egregiously overlooks the fact that the scope of authority granted the judge by Rule 104(a) is not unlimited. The judge's exercise of authority is "subject to the provisions of subdivision (b)." *Id.*

Questions of "logical relevancy" are left to the jury. Questions of "conditional relevancy" are for the court. *See,* Original Advisory Committee's Note for Rule 104(b).

As to the jury's role the Original Advisory Committee's Note for Federal Rule of Evidence 104(b) stated:

> **If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed.** These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration. (Citations omitted).

Id. (emphasis added).

Commentators have addressed the interplay between (a) and (b) of Rule 104:

> We can summarize the policy of Rule 104 this way. Rule 104(a) gives the judge the power to determine most preliminary questions of fact because that is the best way to shield the jury from inadmissible evidence and thus enforce the blank pad rule so as to preserve the jury's function of deciding the case only on the basis of properly screened evidence. **Under Rule 104(b) we take some preliminary questions of fact away from the judge and give them to the jury, not because the jury is better able to decide questions of probative worth than the judge, but because assessing probative worth is a task assigned to the jury under our adversary system of jury trials.**

Wright & Graham, Federal Practice and Procedure: Evidence 2d § 5052.3, p. 63 (emphasis added).

Daubert discusses the application of Rule 104(a) to expert testimony:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the

> reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

509 U.S. at 593-94; 113 S.Ct. at 2797.

Wallingford's traditional expository methodology consisted almost exclusively of documents about the cause and origin of fires in motor vehicle electrical systems, deaths and injuries caused by those fires, the availability and effectiveness of safety devices like BCOs to prevent those fires, and the discussion of these topics by the government, motor vehicle manufacturers, and BCO manufacturers.[1] All of these documents were subject to preliminary questions for the court under Rule 104(a) about authenticity and exceptions to the hearsay rule as well as his expository methodology. The district court initially found Wallingford's evidence fully compliant with *Daubert* and the Virginia Supreme Court's decision in *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 297 S.E.2d 672 (1982). Pet. App. 63a-66a, 74a-76a, 84a-89a.

Once those preliminary questions were decided by the trial court, this Petitioner was entitled to have the jury determine the probative value of the documentary evidence and other evidence introduced through Wallingford under Rule 104(b). That did not occur in this case. The trial court elected to usurp the jury's role

[1] Wallingford also examined the fire damaged 1969 Mustang and equipped a 1969 Mustang with an exemplar BCO after subjecting the BCO to simulated crash testing.

recognized by Rule 104(b) and strike all of Wallingford's evidence when Petitioner rested. The district court reversed itself and asserted that the requirements of *Daubert* and Rule 702 were not satisfied. Pet. App. 27a, 28a. Neither the district court nor the Fourth Circuit identified any grounds for concluding that the voluminous documentary evidence introduced through Wallingford's exposition was either irrelevant or unreliable. Neither the Fourth Circuit nor the district court made any assessment of whether this evidence complied with non-*Daubert* reliability factors. This evidence was excluded because of a perceived inconsistency between Wallingford's trial testimony and deposition testimony and because he had not performed a risk-benefit test on hypothetical scenarios brought out on cross-examination. Pet. App. 6a-8a, 14a-16a, 29a-31a, 33a, 34a. By its terms, Federal Rule of Evidence 104 clearly does not equip a trial court judge with such far-reaching discretion. If such discretion exists, it must be found somewhere else. The district court and the Fourth Circuit relied upon the discretion believed afforded by Rule 702 and *Daubert*. *Id.*

Petitioner's assertion—important unsettled questions about the impact of a trial court's gatekeeping discretion under Rule 702 on the Seventh Amendment right to have a jury decide the credibility of the witnesses and the weight of the evidence should be settled by this Court—is not refuted by the Respondent's Rule 104(a) argument. To the contrary, the interaction between Rule 104(a) and (b), which Respondent ignores, only emphasizes the importance of deciding these unsettled issues.

III. *Blevins v. New Holland North America, Inc.*, 128 F.Supp.2d 952 (W.D. 2001) Held that *Ford Motor Company v. Bartholomew*, 224 Va. 421, 297 S.E.2d 672 (1982) Was the Rule of Decision for Product Liability Cases Where no Government or Industry Standards Apply.

Respondent claims that the holding in *Blevins v. New Holland North America, Inc.*, 128 F.Supp.2d 952 (W.D. 2001) places the burden on the plaintiff in a defective design case to establish that the benefits of the proposed alternative design outweigh the risks: "Wallingford flunked a Virginia law test, because, as explained in (*Blevins*) 'Virginia law encompasses a risk-utility analysis in negligent design cases. *Id.* at 959.'"[2] Brief in Opposition, 14, 18. That claim is baseless.

---

[2] Respondent's quotation from *Blevins* omits the district court's citation for the "risk-utility analysis" which was *Dreisenstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1071 (4th Cir. 1974) where the Fourth Circuit applied the Larsen "crashworthiness" doctrine stressing that it believed that the Virginia Supreme Court would follow the doctrine. *Id.* The risk-utility analysis is part of the crashworthiness doctrine. The crashworthiness doctrine does not place an affirmative burden on the plaintiff to prove that the benefits of a proposed alternative design exceed the risks. Interestingly, however, under the crashworthiness doctrine a manufacturer has a duty to adopt an alternative design if such design would make the product safer. *Id.* In this case, if it were not stated in the opinions of the court's below, it would be incomprehensible that an expert's entire testimony would be stricken because the expert used the word "safer." Pet. App. 14a, 32a. The Virginia Supreme Court specifically declined to adopt the crashworthiness doctrine in *Slone v. General Motors Corporation*, 249 Va. 520 (1995).

The district court relied upon *Blevins* to deny Respondent's motion for summary judgment. Pet. App. 88a, 89a. When the district court granted Respondent's motion for directed verdict *Blevins* was distinguished on the grounds that the defendant, unlike the Respondent in this case, had not "argued" that the risks of the alternative design exceeded the risks. Pet. App. 19a, 20a. In fact, the defendant in *Blevins* sought to defend the plaintiff's defective design action with expert evidence that the utility of the product as designed exceeded any risks. *Id.* at 960. For obvious reasons, the Fourth Circuit makes no mention of *Blevins*. Pet. App. 2a-11a. There is no possible interpretation of the district court holding in *Blevins* that would support the Fourth Circuit's holding in this case that: "[B]ecause Tunnell's evidence did not show that the risks associated with a power cutoff were outweighed by the benefits from a decreased possibility of post-collision electrical fires, the district court correctly granted Ford's motion for a directed verdict." Pet. App. 9a, 10a.

The purpose for the discussion of *Blevins* is readily apparent. The rule of decision for the case *sub judice* is set forth in *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 297 S.E.2d 672 (1982). Pet. 16, 17. *Bartholomew* does not impose a burden on the plaintiff in a design defect case to establish that the benefits of the proposed alternative design exceed the risks. *Id.* The Respondent is desperate to find some support somewhere in the substantive law of Virginia that imposes such a burden upon a plaintiff. Otherwise, there is no basis to support the Fourth Circuit holding that "[B]ecause Tunnell's evidence did not show that the risks associated with a power cutoff were outweighed by the benefits from a decreased possibility

of post-collision electrical fires, the district court correctly granted Ford's motion for a directed verdict." Pet. App. 9a, 10a. Respondent's out-of-context treatment of *Blevins* mention of a "risk-utility analysis" does not accomplish that purpose.

In *Blevins v. New Holland North America, Inc,* a farm worker was injured by a hay baler allegedly defective for its lack of an emergency stop system. Both sides filed motions *in limine* to exclude the others expert evidence. The defendant manufacturer's expert Clary was proposing to testify that a product was not defective if the utility of the product exceeded the risk of use. *Id.* at 960. The court held that the defendant could assert the risk-utility analysis through Clary as a defense to the plaintiff's claim that the hay baler was unreasonably dangerous without the emergency stop. *Id.*

The court in *Blevins* did not hold that the plaintiff had an affirmative burden to prove that the benefits of the emergency stop exceeded the risks. Indeed, *Ford Motor Co. v. Bartholomew* was held to be the rule of decision because no industry or government standards were applicable. *Id.* at 958.

The Fourth Circuit failed to either distinguish or follow the Virginia rule of decision for design defect cases where no government or industry standards apply. Pet. 16. That failure constitutes a clear violation of 28 U.S.C. § 1652 and merits a grant of the petition for a writ of certiorari.

IV. It is Undisputed that *Daubert* did not Address Whether Federal Courts are Required Under *Erie* to Apply Substantive State Law that is Bound Up with Evidentiary Considerations Instead of Judge Made Rules or Whether State Law Should be Considered as a Factor Bearing on the Relevance and Reliability Inquiries.

According to the Respondent, "Petitioner forgets, however, that the Federal Rules of Evidence—not Virginia substantive law—governs the admissibility of evidence." Brief in Opposition, 16.

> "[W]hile some federal circuit courts have ( ) followed this logic (that the Federal Rules of Evidence would trump a state rule of evidence), most that have addressed the *Erie*/ Federal Rule of Evidence issue are in basic agreement that some state evidentiary rules are so substantive that federal courts sitting in diversity cases must take account of them."

Craig, *When Daubert gets Erie: Medical Certainty and Medical Expert Testimony in Federal Court*, 77 Denv. U.L. *Rev.* 69, 81, 82 (1999-2000). Petitioner argues that the same is true with respect to a rule of state substantive law as opposed to a state rule of evidence. That is, a state's substantive law may have so much evidentiary overlay that it amounts to a substantive right that must be applied and respected under the *Erie* doctrine as well as 28 U.S.C. § 1652.

The Respondent forgets that this Court has not decided whether application of a federal judge-made rule, like the risk-benefit test in this case, must yield to the *Erie* doctrine even if the application of the judge-made rule ostensibly occurs under the purported discretion afforded by *Daubet* and Rule 702. *See, footnote 6, Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590, 113 S.Ct. 2786, 2796 (1993); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938).

Ford Motor Co. v. Bartholomew presents a substantive rule of law for deciding design defect cases where no government or industry standards apply. This substantive rule is wholly evidentiary in nature. Pet. 16, 17.

The Fourth Circuit did not apply this substantive rule of Virginia law. The unanswered questions arising are whether the *Erie* doctrine trumped a trial court's discretion under Rule 702 and required the Fourth Circuit to follow *Bartholomew*, or at least consider this rule of decision by the Virginia Supreme Court in determining relevance and reliability under *Daubert* and Rule 702.

CONCLUSION

Respondent's reasons for denying the petition are unfounded. For the reasons stated herein and previously, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRED D. SMITH, JR.
FRED D. SMITH, JR., P.C.
46 West Main Street
P.O. Box 991
Martinsville, VA 24114-0991
(276) 638-2555
freddsmithjr@comcast.net

Attorney for Petitioner